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PRESIDENT, PRIME MINISTER, OR  
CONSTITUTIONAL MONARCH?

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# PRESIDENT, PRIME MINISTER, OR CONSTITUTIONAL MONARCH?

By EUGENE V. ROSTOW

## I

### *Introduction*

**I**N THE MAKING and conduct of foreign policy, Congress and the President have been rivalrous partners for two hundred years. It is not hyperbole to call the current round of that relationship a crisis—the most serious constitutional crisis since President Franklin D. Roosevelt tried to pack the Supreme Court in 1937. Roosevelt's court-packing initiative was highly visible and the reaction to it violent and widespread. It came to an abrupt and dramatic end, some said as the result of Divine intervention, when Senator Joseph T. Robinson, the Senate Majority leader, dropped dead on the floor of the Senate while defending the President's bill. Everyone knew that Robinson hated the proposal, and was speaking for it only as a matter of political duty. The bill was discreetly buried shortly thereafter, the Court having meanwhile adjusted some of its doctrine to the prevailing winds. One justice resigned.<sup>1</sup>

The present constitutional crisis cannot be so neatly resolved. It is insidious, diffuse, and largely invisible, like the early stages of a cancer. Its roots are deep, and it has been spreading at an accelerating pace since 1932, when the legislative veto was invented. Few people realize that a crisis is going on, particularly because congressional accretions

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Various parts of this paper draw on testimony presented to the Permanent Select Committee on Intelligence of the House of Representatives during 1988 in hearings on H.R. 3822, a bill to amend the Intelligence Surveillance Act of 1980. And sections of it are scheduled for publication in the *American Journal of International Law* and the *University of Pennsylvania Law Review* in the near future.

of power are invariably explained as moves to take back legislative prerogatives recently seized by a succession of "imperial" Presidents. Congress' thrust for dominion has not so far aroused much political resistance, and the professional writing on the subject has been largely an apology for the claims of Congress. Many members of Congress are concerned about the constitutional implications of what they are doing, but institutional or political loyalties constrain most of them from speaking out.

While Congress' attempt to control foreign policy is only part of a wider congressional assault on the authority of the Executive, it is more acute than the struggle on other fronts because public concern over foreign affairs is more anxiously aroused than is the case for most other issues of public policy. The role of the President in relation to Congress on foreign policy is inherently more prominent than it is, for example, on tax policy. Furthermore, after Korea and Vietnam, the nation is no longer so strongly united in supporting the foreign policy initiated forty years ago by President Truman and Secretary of State Acheson, and followed in broad outline by all the Presidents and by Congress since that time.

I have been asked to address one phase of the controversy between Congress and the President: the question whether the Constitution—the Constitution of usage, that is, and not the text alone—establishes an adequate procedure for making and carrying out American foreign policy. That question necessarily implies another: Are our constitutional law and practice in the field of foreign relations not simply adequate but satisfactory, or even excellent, taking into account not only the problems of foreign policy confronting the nation but the imperatives of governmental accountability and responsibility which are and should remain among the most jealously guarded values of American society? In short, do our constitutional foreign policy arrangements require structural reform?

I should summarize my answer to the question in these terms: Until the mid-1970s our strenuously balanced Constitution was not only adequate but altogether satisfactory. Since that time, however, an unusually vigorous and sustained

congressional bid for supremacy over the Executive, stimulated by the Vietnam war and the Watergate scandal, has threatened to convert the American President into a Prime Minister or even a benign constitutional monarch. This possibility will not materialize over the long run, because what Madison called "the impulse of self-preservation" will prevail: the security of the United States requires a strong President working in harness with a strong Congress. The long run may be too long for comfort, however. In the modern world, the nation's safety is at risk so long as the foreign policy process is dominated by a Congress aspiring to take over the executive power. During his campaign for the Presidency in 1988, Vice-President Bush said that he regarded the constitutional defense of the Presidency as one of the President's major responsibilities. The Reagan administration, like the Ford and Carter administrations before it, was not notably active on this front, and it is to be hoped that President Bush will succeed quickly in restoring the constitutional balance between the Presidency and Congress. Much turns on the outcome of his effort.

The remedies President Bush should seek are not structural but substantive. Preaching or even practicing consultation and cooperation, desirable as they are if not indulged to excess, is no panacea. The conflict is about power, and cannot be solved by tinkering with tables of organization and flow charts, by passing more statutes which purport to regulate the President's work habits, or even by amending the Constitution. If the extraordinary gains in power Congress has achieved during this period are to be undone, the change will have to be achieved by the President and the federal courts acting together. Congress cannot be expected to give up its hard-won modern privileges voluntarily. Therefore, the judiciary should act. The courts are often called the balance wheel of the Constitution. In this case, the rhetorical cliché is apt. The judiciary is the only institution of government directly charged with the task of enforcing the constitutional limits of power. The judiciary cannot act, however, without test cases, and the President has always been an important initiator of test cases.

This paper is divided into three parts: an introduction, a brief statement on the issues of constitutional theory involved, and comments on four recent controversies involving these questions: (1) the Iran-Contra affair; (2) the Intelligence Surveillance legislation passed after the Watergate scandal, and the revisions considered by the 100th Congress; (3) the proposals to amend the War Powers Resolution of 1973; (4) and the violent political conflict about the interpretation of the ABM Treaty of 1972, which is reflected in turn in the history of the ratification of the INF Treaty.

## II

### *Constitutional Policies at Stake*

In the field of international relations, the government of the United States has all the rights, powers, privileges, immunities, and duties of nationhood or "sovereignty" recognized in international law. The international powers of the nation are not to be deduced from the few spare words of the constitutional text, but from their matrix in international law. Those powers are divided by the Constitution between Congress and the President. In this as in other areas of governmental responsibility, Congress is entrusted with specified legislative powers and the President with "the" executive power of the United States, save for a number of exceptions noted in the document itself, i.e., the Senate's voice in the making of appointments and the ratification of treaties, and Congress' power to declare war.

No one has ever improved on Hamilton's definition of executive power. All governmental power which is neither legislative nor judicial, he said, is executive.<sup>2</sup> For nearly two hundred years, that simple division of authority, interpreted in the light of experience, permitted effective policy making through the only constitutional pattern for conducting foreign relations compatible with the nature of world politics, on one hand, and with the American political culture, on the other.

The President is not elected by Congress. He is not a creature of Congress. And he is not required to report to Congress, except for his annual State of the Union address.

The historical experience of the United States confirms the wisdom of Marshall's comment in *Marbury v. Madison* that "the secrets of the cabinet" are beyond outside scrutiny,<sup>3</sup> and that "the President is invested with certain important political powers in the exercise of which he is to use his own discretion, and is accountable to his country in his political character, and to his own conscience."<sup>4</sup> In these areas, Congress can request information of the President; it can never command it. This is not to say that the President is above the law. *Marbury v. Madison* demonstrates the contrary. But the law is vindicated by many procedures without subordinating the President to Congress or the courts in all cases.

This is not to suggest that the process has always produced wise results. That is another matter. But, until recently, it worked as a political procedure. The mistakes the nation made were not the consequence of inadequate deliberation, but of inadequate thought. It was also a strenuous procedure in which the rivalry between Congress and the President fully met the standard of Justice Brandeis' celebrated maxim. Justice Brandeis wrote:

The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.<sup>5</sup>

In recent years, however, the pattern has changed. The tension between Congress and the President is no longer the push and pull of a natural tug of war between the legislative and the executive, operating as partners within the framework of well understood rules and habits. The balance between Congress and the Presidency has shifted so much and so radically that "the inevitable friction" Justice Brandeis welcomed has become something quite new—a real war, marked by episodes of bitter hostility and by a slow Presidential retreat which is transforming the President into a ceremonial figurehead graciously presiding over the activities of an omnipotent Congress.

The powers of the Presidency have not been formally annulled. They are still latent in the bloodstream of the government. But they encounter more and more resistance each time a President tries to use them. As a result, the President is being gradually stripped of some of his most important prerogatives.

If present trends are not reversed, the President will soon be wrapped like Gulliver in a web of regulatory statutes and hopelessly weakened. Congress has not given up trying to nullify the President's veto power, despite the decision of the Supreme Court in the *Chadha* case.<sup>6</sup> Congress has taken almost no steps to comply with that decision by repealing all the statutes within its orbit. Although the President has the sole constitutional authority to conduct foreign relations, congressional leaders sometimes negotiate independently with foreign governments, as they have done recently with Nicaragua, for example, and with other governments as well. Substantive riders on appropriations bills and other devices to evade the President's veto power are more popular than ever. Congress is now even proposing to put the President under the control of a congressional cabinet in the exercise of his responsibilities for intelligence, the use of force, and foreign policy more generally. And it is more and more common for statutes to prescribe what have always been considered matters of executive discretion; e.g., how and where to conduct military operations.

Why should one characterize the development of the relationship between Congress and the President in recent years as a crisis rather than a stage in the healthy and normal evolution of constitutional law? The justification for that opinion, I submit, is not a pious antiquarian interest in preserving the original Constitution, nor even a concern for effective government, important as it is, but the policy of vigilance against the risk of tyranny. What is at stake in this experience was powerfully analyzed by Madison in Numbers 47 and 48 of the *Federalist Papers*.

Madison warned that the greatest danger to the constitutional order and to the liberty of the citizen was not the possibility of a tyrant President, which he regarded as slight, but the risk that Congress would take over the powers of the other two branches of government. "The accumulation of all

powers, legislative, executive, and judiciary, in the same hands," Madison wrote, "may justly be pronounced the very definition of tyranny."<sup>7</sup> Power "is of an encroaching nature,"<sup>8</sup> Madison remarked, and something more than "parchment barriers" is required to restrict it "from passing the limit assigned to it."<sup>9</sup> The risk of congressional abuse of power is great, far greater than the risk from the President or the Courts. Congress "alone has access to the pockets of the people."<sup>10</sup> Its supposed influence over the people is an inducement to act, and it can expand its powers in many ways, masking its encroachments "under complicated and indirect measures."<sup>11</sup> Madison concluded that "it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions<sup>12</sup>. . . The legislative department is everywhere extending its sphere of activity, and drawing all power into its impetuous vortex."<sup>13</sup>

Confronting the growth of congressional power, many scholars accept the thesis of congressional supremacy in the plausible name of "democracy." The choice of congressional supremacy as the major premise for their analysis is most often made casually, almost instinctively, and almost always without extended consideration of what is involved.

These writers normally preface their treatment of the issue with the familiar but erroneous comment to the effect that Congress is simply trying "to recapture legislative power" that had drifted to the President since Lincoln, McKinley, or Franklin D. Roosevelt took office.

It is amply clear, as two recent full-dress reviews of the problem demonstrate,<sup>14</sup> that since the time of George Washington, Presidents and Congress have conducted America's foreign policy in roughly the same pattern of constitutional usage. Some proponents of congressional supremacy dismiss this evidence of constitutional practice on a most astonishing ground. Arthur M. Schlesinger, Jr., for example, writes that the early Presidents "usurped power and thereby created no constitutional precedent—an action to be distinguished from the claims of legal sanctions for extreme acts characteristic of presidents of the last generation, claims that would set dangerous precedents for the future."<sup>15</sup>

Schlesinger believes the exclusive power to declare war conferred on Congress in article I, section (8), gives Congress the sole authority to use or threaten to use the national force, save perhaps in the case of sudden attacks.<sup>16</sup>

This common view rests on two simple errors. Under international law, to which the relevant paragraphs of article I refer, declarations of war are required only for the rare occasions when states engage in unlimited general war. As the Founding Fathers knew from intimate experience, such declarations are not required when states feel compelled to use limited force in defending themselves not only against "sudden attacks" but against many other breaches of international law of a forceful character.<sup>17</sup> During the last two hundred years, the United States has declared war five times, but Presidents have used the armed forces abroad at least two hundred times, usually on their own authority, sometimes with the support of Joint Resolutions before or after the event. What President Kennedy did during the Cuban Missile Crisis of 1962, as Professor Schlesinger will recall, was a Presidential action of this kind. And Hamilton argued that Congress' power to declare war, being an exception to the general powers of the Executive according to the model the Founding Fathers knew best, that of the British crown, should be confined to the terms of the text.<sup>18</sup>

The second error in Schlesinger's article is equally conclusive. Presidential uses of force in dealing with the threat of force or the use of force against the nation were never presented by Presidents as unconstitutional and treated with guilty attempts at concealment. They began during President Washington's first term. Congress acknowledged such actions as obviously proper, then and later. I should contend that most of Lincoln's actions before and during the Civil War and Franklin D. Roosevelt's actions before Pearl Harbor were valid exercises of the President's emergency prerogative powers, not unconstitutional violations of law at all. The United States has all the powers of statehood recognized in international law and therefore has emergency powers like those of other nations. If Congress has not exercised these emergency powers, or cannot exercise them, the President has constitutional authority to do so. And circumstances may create situations,

as Locke recognized, where it would be constitutionally proper for the executive to act even in contravention of the written laws.<sup>19</sup> To my mind, it seems contrary to the most elementary notions of legal theory to claim that Lincoln's conduct of the Civil War, the most important single use of Presidential power in American history, was unconstitutional. From that judgment, I should except his suspension of martial law where the civil courts were open, but little beyond it. And that early, tentative step, taken before Congress authorized the suspension of the writ in a statute later declared unconstitutional, was not carried to the point of execution.

Nonetheless, the principle of congressional supremacy continues to be asserted. Thus, Frederick M. Kaiser finds that, while the Constitution is often thought to establish a system of checks and balances among seemingly separate branches of the government, in fact it provides for legislative supremacy. The rationale behind this conclusion, Mr. Kaiser writes, "is that a representative assembly is less of a threat to the rights of citizens and to the other branches than is the unitary office of President, where constitutional authority is centralized in one individual. . . ." <sup>20</sup> The status of Congress as "the first branch of government" is further confirmed, he contends, by the fact that it is created by the first article of the Constitution, by Congress' power to override a Presidential veto, and by its impeachment power.<sup>21</sup> And Professor Louis Henkin, disagreeing with Hamilton, supports Hamilton's critics who insist that the President has only the few powers expressly granted him; that those powers are subtracted from the plenary powers of Congress, and are, therefore, to be narrowly construed; and that in foreign as in domestic affairs Congress is primary and supreme.<sup>22</sup>

In the end, however, Henkin's conclusions derive from a quite different and a consciously extra-constitutional standard of judgment. The question for us to face, Henkin says, is not what our constitutional history requires or permits, but "what kind of country we are and wish to be. I am disposed to state the question as: How should foreign affairs be run in a republic which has become a democracy?" <sup>23</sup> This is unilateral lawmaking with a vengeance, going far beyond the

interstitial. Henkin boldly admits what is implicit in the writings of Revely, Lofgren, Kaiser, Fisher, and other advocates of congressional supremacy who claim their views are compatible with the constitutional experience of the United States. Henkin asks for a new Constitution, based on the mystical proposition that the American "republic has become a democracy." From this vantage point he has no difficulty in concluding that Congress can if it wishes regulate the President fully, save in the few areas where the President's claim to independent power is historically too well established to be challenged. Given his premise, it is surprising that Henkin concedes so much to orthodoxy.

Such opinions take too simple a view. The constitutional arrangements required to safeguard democratic government in a large country are more complex than those of a Vermont town meeting. And even a Vermont town meeting is not government by universal voice vote on every issue. The members of Congress are indeed elected by state-wide and district-wide constituencies. But the President is elected too. And the judges and many other officials have unimpeachable democratic legitimacy even though their authority is derived from appointment rather than from election.<sup>24</sup>

The defenders of congressional supremacy make much of the fact that Congress necessarily has the last word. But Congress does not have the last word on all subjects. Even in exercising its appropriation power, Congress faces the constraining doctrine of "unconstitutional conditions." Congress cannot, for example, recognize foreign governments, retain or dismiss federal officials,<sup>25</sup> impose legislative punishments,<sup>26</sup> or decide on the strategy and tactics of wars.<sup>27</sup> Congress has the last word only in the superficial sense that it could, if it wished, refuse to appropriate money for the President and the Courts.

To make that possibility the central issue in the constitutional debate begs the question. Congress would refuse such funds only under conditions of revolution, after the constitutional order had, in fact, already collapsed or been destroyed. Short of revolution, the claims of congressional "supremacy" in this sense repudiate both the origins and the subsequent history of the Constitution. The Founding Fathers came together first in Annapolis and then in Philadelphia because

the nation was floundering under a government which was entirely congressional. The purpose and effect of the Constitution was to replace congressional government by a more complex system consisting of three autonomous, overlapping, and interdependent branches, each of which, however, is entirely independent in some of its functions.

It is impossible to exaggerate the practical effects of the new doctrine that the three branches of the American government are not equal, but that Congress is *primus inter pares*. It would reverse one of the most important principles of policy and law which has hitherto governed the construction of the Constitution by the Supreme Court, by Presidents, and by Congress.

That principle is sometimes compressed into a legal formula, fully stated by Hamilton, and supported by Jefferson, Marshall, and many others, as well as by the pattern of usage. If a power is executive in nature, Hamilton said—that is, if it is neither legislative nor judicial—whether it happens to be mentioned in the text of the Constitution or not, it is Presidential in character unless it is excluded by the constitutional text. If a power is executive in this sense, Presidential supremacy is the rule and congressional authority the exception, and exceptions are to be narrowly construed.<sup>28</sup>

Marshall expounded the policy behind the rule in *McCulloch v. Maryland* in terms which have never before been challenged.<sup>29</sup> The several powers of the national government, Marshall wrote, were conferred by the people in a brief, general constitution designed to be read and understood by the citizens at large. That document did not attempt to define the government's powers in detail nor to foresee every situation in which they would be applied in the future. The Constitution is not "a prolix code," but an outline, a legal instrument intended to be interpreted by "general reasoning." When construing the powers of the national institutions, the rule of construction should not be narrow or niggardly, but one dominated by the great purposes of the Constitution itself. "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist

with the letter and spirit of the Constitution, are constitutional."<sup>30</sup>

The modern idea of congressional supremacy would repudiate and reverse Marshall's rule of construction. Congressional supremacy is taken to be the rule for all questions, not only for those which are legislative in character. The President would be confined to those powers mentioned in the Constitution as Presidential, and even those powers would be narrowly construed as exceptions to a general rule of congressional supremacy.

The normal congressional impulse to nibble at the President's authority has gained momentum in recent years from four major sources.

The first and perhaps the most important has been the nearly incredible growth in congressional staff, which goes back to the Legislative Reorganization Act of 1946. Before that fateful reform was adopted, Congress and its committees relied largely on the administration of the day for assistance in research and drafting. Indeed, in those far-off times, members of Congress often did their own research and drafting. The Congressional Research Service of the Library of Congress provided some supplemental help, but until the recent past that service was extremely small. Today, congressional staffs include some 35,000 people, and the Congressional Research Service another 5,000. It is hardly remarkable that Capitol Hill has been sprouting splendid marble palaces to house the new bureaucracy.

Like many other reasonable reforms, the growth of congressional staff has had unforeseen consequences. Members of Congress and their proliferating committees and subcommittees have discovered that able and independent staffs are a decided asset for electoral as well as for legislative purposes. Furthermore, appointing members of these staffs is a fruitful form of political patronage. And the staffs themselves have transformed the contest between the President and Congress. The young men and women who serve Congress are intelligent, hard-working, and ambitious. They achieve satisfaction and reputation not by rubber-stamping the plans of the administration but by revising or defeating them as conspicuously as possible—by amending or rewriting administration drafts of bills, joint resolutions, or committee reports; by suggesting

dramatic or hostile lines of questioning to their principals for committee hearings; and by producing committee reports and draft speeches intended to shape the legislative history of the bill as it is finally enacted.

The influence of a growing congressional staff on the relations between Congress and the President has been reinforced by a second source of congressional ascension: the modern political habit of electing a Democratic Congress and a Republican President. The result has been rather popular with the voters, who regard it as another check and balance, restraining the malignant natural impulses of politicians. But the habit has decidedly negative features as well. It encourages partisan irresponsibility on the part of Congress even on major national issues, especially in the field of foreign affairs, and constitutes an additional obstacle to rational districting for the House of Representatives.

These two tendencies together produce a third: the practice of writing long and elaborate statutes intended to control the President and the Courts in great detail as they apply statutes and treaties to new situations. The notion that legislatures can control the growth of law in such detail is a naive delusion, but it is widely shared.

Fourth and finally, congressional attacks on the President's prerogatives in the field of foreign affairs draw strength from widespread protest against the foreign policy the United States has pursued since 1945. That protest is based on a nostalgic yearning for the neutrality and comparative isolation of the United States during the century between 1815 and 1914. It is an important factor both in American domestic politics and in American foreign policy, despite its irrationality. The Concert of Europe which gave us comparatively "free security" during the nineteenth century no longer has the power to do so.

It was pointed out earlier that the constitutional balance between Congress and the Presidency cannot be restored without vigorous action by Presidents to defend the Presidency and by equally vigorous judicial intervention. Two principal reasons explain the weakness of the defending forces thus far. Recent Presidents have hesitated to challenge the congressional claims of supremacy directly, because they have felt vulnerable

to congressional reprisals in many forms, and Congress, with the smell of victory in its nostrils, has been in the mood to inflict reprisals. Moreover, during most of the Reagan administration, the Justice Department has tended to agree with the premise of congressional supremacy, or at any rate to agree with the view that constitutional conflicts between Congress and the President should be settled by political bargaining, and not by an "activist" Supreme Court.

As a result, the Presidency has not been vigorously defended in the Courts although the Supreme Court has sustained the principle of the separation of powers whenever it was given the opportunity to do so. The principle of the separation of powers cannot be preserved, however, by default, defeatism, and bad legal doctrine in the executive branch. Many of the wounds the institution of the Presidency has suffered in recent years have been self-inflicted.

### III

#### *Four Recent Cases*

A. THE IRAN-CONTRA AFFAIR      Only the memory of Watergate can explain the first perfervid reaction of the media and, to a lesser extent, of American public opinion to the Iran-Contra affair. The charge that President Reagan was acting in defiance of the law in his Iran negotiations raised questions which had to be answered. Public inquiry by a Presidential Commission and by Congress was the natural response of the constitutional system.<sup>31</sup> It soon became clear, however, that the affair raised only two secondary questions of substance— attempts to conceal evidence which should have been available to Congress and the courts, and the handling of government funds—and that the initial outcry was excessive, badly focussed, and misguided.

Looking back at the documentation of the Iran-Contra episode, four issues emerge:

(1) President Reagan decided that it was a propitious time for the United States to improve relations with Iran by secret diplomatic negotiations.

(2) Iran was engaged in a prolonged and costly war with Iraq, and it held or could control the fate of American citizens

it had kidnapped or, in any event, could treat as hostages. In order to improve relations and to facilitate the release of the hostages, the President decided to sell some arms to Iran at high and profitable prices.

(3) Some of those profits may have been diverted to the Contras in Nicaragua, the rebels in Afghanistan, or others. The evidence on these matters is still murky. In any event, the funds do not seem to have been turned over to the Treasury routinely, as they should have been.

(4) In the enquiries which ensued after the affair became public, the Reagan administration did not take the position that its secret diplomacy with Iran should remain secret; instead, it said it would cooperate fully with the Tower Commission and with congressional investigations. It transpired that some members of the administration lied, destroyed papers, or otherwise concealed evidence.

The first two issues were the original center of the outcry, but, as the handling of the affair by the Tower Commission, Congress, and by Judge Gerhard A. Gesell in the trial of Oliver North confirms, those two issues do not raise either constitutional or significant statutory questions.

From the beginning of the constitutional era in American history, the conduct of diplomacy has been treated as an exclusively executive power. If a President thinks that the time has come to explore the possibility of improved relations with another country or a less formal group—the P.L.O., for example—the decision is his to make. Congress can ask the President or his subordinates for an explanation of the decision, but the President may refuse to make such a report, if he deems it impolitic for any reason to do so. The Logan Act stands as a dramatic monument to the proposition that the President has always been considered “the sole organ of the nation” in its diplomatic relations with other governments. And from the time of President Washington, Presidents have rejected or ignored congressional requests for information when they deemed the matter to be entirely within their own realm.

One might note in passing that during the period of enquiry into the Iran-Contra affair there was considerable

discussion of the fact that the President overruled his Secretary of State and Secretary of Defense when he decided to proceed with the negotiations, as if there were something unusual or wrong in a President disagreeing with his Cabinet ministers or acting through members of his personal staff or even through private citizens. Such objections mistake the nature of the Presidency and betray ignorance of American diplomatic and constitutional history. On a famous occasion, Lincoln read a draft of the Emancipation Proclamation to his Cabinet. When his ministers unanimously advised against issuing the Proclamation, he commented laconically, "The ayes have it." Presidents have used unorthodox channels in diplomacy, usually for important reasons of policy, since Washington's day. Wilson conducted an important part of the diplomacy of the First World War through Col. House, a private citizen, and Franklin D. Roosevelt used Harry Hopkins for the same purposes before and during the Second World War, as Nixon used his Special Assistant for National Security Affairs, Henry Kissinger. Congress has no more power to prescribe the procedures the President should use in reaching decisions or carrying them out than it has to pick his staff.

The claim, however, is persistent. On January 9, 1989, for example, a *Washington Post* editorial solemnly declared that the heart of the objection to the Iran-Contra affair was that it was a "rogue foreign policy . . . conducted outside the normal governmental framework and, at least to some extent, against and in defiance of the stated will of Congress." A diplomatic exploration conducted under the direction of the President can never be "outside the normal governmental framework" and Congress has no power to regulate such Presidential activities.

The constitutional issues are not significantly altered because the President decided to sell arms to Iran in the course of the negotiations. While there has been skirmishing about the legality of the arms sales under some particularly obscure and dubious statutes, there is no substantial question about the President's legal capacity to sell the arms transferred to Iran, both in order to improve our relations with Iran, and in order to obtain the release of American hostages held in Iran.

There has, of course, been a great protest about the President's willingness "to trade arms for hostages"; indeed, that slogan seems to have been the principal element in the public indignation about the Iran-Contra episode. On examination, however, the basis for the outraged state of opinion on the issue disappears.

When American citizens travelling or living abroad are exposed to official or unofficial conduct which violates international law, the United States owes them the duty of protection by all reasonable means. The state's duty to protect its citizens cannot lightly be ignored. It has always been considered the counterpart of the citizen's duty of allegiance. Thus, in Jefferson's troubles with the Barbary pirates, it was deemed altogether legal for the United States to use force against the pirates. The law is unchanged in this respect. The Israeli raid on Entebbe in 1976 and President Carter's abortive attempt to rescue our hostages in Iran in 1980 are two among many modern instances of the exercise by states during peacetime of their inherent right to use whatever force is reasonably necessary to defend their interests against breaches of international law of a violent character, when peaceful remedies are unavailable or would be unavailing.

When it would be imprudent or impossible to use limited force as a remedy for such a breach of international law against a state, that state faces a stark choice between full, general, and unlimited war and paying tribute in one coin or another. In the case of the Barbary pirates, Jefferson used limited force, and, when he found the use of force futile, he paid tribute. The problem of piracy in the western Mediterranean did not come to an end until France took over Algeria some years later.

Thus, in the Iran-Contra affair, the public indignation was concerned not with solemn considerations of constitutional law but with the rhetoric the administration had used in explaining its policies for dealing with kidnapping and other forms of terrorism. When Reagan and Shultz said with emphasis that the United States would concede nothing to terrorists, most Americans straightened their shoulders and felt proud. The administration became the victim of its own eloquence, however, when it confronted the fact that using

force effectively against Iran would raise disturbingly difficult questions. In the end, the United States decided to do what it had criticized other countries for doing—namely, trying to settle for the best deal it could get. Everyone recalls St. Paul's confident words, "Civis Romanus sum," but the Romans sometimes found it necessary to deal with pirates and hostage takers, and even the Israelis have done so at least once.

Strictly speaking, the wisdom of Reagan's decision to explore the possibility of improving relations with Iran was not an issue in the outcry about the affair. Reagan's critics were not talking about a mistaken policy or a failed policy but about a scandal, perhaps a crime. The Iran-Contra affair was investigated as a manifest outrage which clearly involved illegal or at least improper acts recalling Watergate.

It is probably too soon to reach a conclusion about the substance of the President's judgment in the Iran-Contra episode. It is already apparent, however, that there were and are deep divisions within the Iranian Government about its future relations with the outside world, and that Reagan's probe was by no means an aberration.

The third issue in the Iran-Contra affair, the possible diversion of profits from the arms sales to the rebel forces in Nicaragua, raises issues which are unintelligible except in the context of Congress' prolonged attempt to seize control of the President's share of the war power.

The place to begin is the fact that Nicaragua has been the conduit for Cuban and Soviet supplies and other aid for a prolonged insurrection in El Salvador and an active participant in that effort to overthrow the government of El Salvador. Indeed, the war in El Salvador has been conducted from a command post in Managua. From the vantage point of international law, Nicaragua has thus been engaged in an "armed attack" on El Salvador. Under article 51 of the United Nations Charter, El Salvador, therefore, has the "inherent" right to defend itself against the attack, and other nations have the right to help El Salvador in its defense. The Charter of the United Nations calls such actions by third countries an exercise of their "inherent" right of "collective self-defense." This is the legal principle on which NATO and America's other

security treaties are based. In this instance, Congress has fully and repeatedly supported the decision of Presidents Carter and Reagan to assist the government of El Salvador in its own defense.

As a matter of international law, how far can El Salvador and the United States go in defending El Salvador against an attack mounted from Nicaragua? And as a matter of American constitutional law, how far can Congress go in controlling the discretion of the President in carrying out a policy of collective self-defense for El Salvador initiated by two Presidents and approved by Congress?

Under international law, the use of force in self-defense should be limited to what is reasonably necessary under the circumstances to defeat and terminate Nicaragua's violation of the rights of its neighbors. The defense of El Salvador, however, need not be confined to its own borders. International law fully recognizes the right of the victims of the attack to respond against its source. They need not stand in the jungle waiting for guerrillas to sneak across the frontier at night.

In one of the leading cases on this subject, the *Caroline* case which arose in 1837, the United States failed to arrest and disperse a group of men training on an island in the Niagara River in order to cross the border and join an insurrection against British authority in Canada. A company of British soldiers entered the United States, effectively dispersed the "freedom fighters," and returned to Canada. The United States conceded that if there were sufficient urgency the British action would be justified, and complained only that the British Government should have given the United States more time to discharge its duty to suppress the insurgent group.<sup>32</sup>

The same principle of anticipatory self-defense was applied by the United States during the Cuban Missile Crisis of 1962 and when President Wilson sent troops across the border into Mexico to suppress the raids of Pancho Villa against American border towns. There are many other instances in which it was accepted that force could be used directly against the aggressor country if necessary in order to end its violation of international law. From the point of view of international law, then, the use of force by the United

States against Nicaragua on El Salvador's behalf was permissible.

The constitutional issue is more complicated. The pattern of usage has been that Congress cannot control the President's discretion as Commander-in-Chief except through a refusal to appropriate funds. After Pearl Harbor, President Franklin D. Roosevelt decided on a strategy of dealing with Germany first in the Second World War. Could Congress have directed him to attack Japan first or to open a second front in Europe during 1943 rather than 1944? To bomb rather than invade? To negotiate an armistice? While two decisions of the Supreme Court during the limited war with France in the late eighteenth century enforced statutes which limited the discretion of the President in fighting the war in various ways, the constitutionality of those statutes was not considered by the lawyers nor by the Courts.<sup>33</sup> And towards the end of the Vietnam war, Congress did venture a number of statutes forbidding the bombing of Cambodia and imposing other restrictions on the war. Here again, the President acquiesced in Congress' action. Nonetheless, the pattern of constitutional usage on these issues is overwhelmingly clear: Questions of this order are entirely for the President to decide as Commander-in-Chief.

During the Reagan administration's prolonged campaign against Nicaraguan aid to the insurrection in El Salvador, Congress passed a number of statutes dealing with American aid to the rebellion of the Contras against the government of Nicaragua. These statutes are generally known as the Boland amendments, because Congressman Boland proposed them. They were attached to appropriation bills, and had a short life.

It has never been authoritatively decided whether they prohibited only official American military assistance, whether they applied to the White House staff, and whether in fact they were a gesture, or a serious attempt to cut off military aid to the Contras. Some claimed that the Boland amendments were convenient fig-leaves for Congressmen who wanted to be against "another Vietnam" in Central America and at the same time did not want to be accused of allowing another country

to fall under Soviet control or of interfering with the President's efforts to persuade other countries to join the United States in helping El Salvador defend itself against the insurrection.

Whether the Boland amendments are constitutional, and exactly what they mean, are, however, irrelevant to the ultimate question left by the Iran-Contra episode: whether every penny received from the sale of arms to Iran belonged to the United States, or whether the so-called "profits" from the sales fell into another category. That is an important question, and not a very difficult question, but it does not account for the political excitement engendered by the affair. There can be little doubt that the proceeds of the sales should have been paid to the Treasury.

Similarly, there can be no dispute about the illegal character of perjury or other attempts to deceive Congress or the courts, whether or not the Boland amendments were constitutional.

**B. INTELLIGENCE OVERSIGHT LEGISLATION** The main congressional response to the outcry about the Iran-Contra affair has been an attempt to strengthen the reporting requirements of the intelligence oversight legislation adopted after the Watergate scandal more than a decade earlier. That legislation—the Hughes-Ryan amendment of 1974 and the Intelligence Oversight Act of 1980—requires the President to keep the House and Senate Intelligence Committees fully and currently informed about the so-called "special" or "covert" intelligence activities of the United States, including any significant anticipated intelligence activities.

In deference to the President's constitutional powers, however, the statutes left the President considerable discretion. In the first place, the 1980 act noted that its requirements were imposed only "to the extent consistent with all applicable authority and duties, including those conferred by the Constitution upon the executive and legislative branches of the government." Secondly, it established two exceptions to the provision requiring current reporting of intelligence activities and advance notice of covert operations. If the President deems

that "extraordinary" circumstances affecting "vital" interests of the United States are involved, he may restrict prior notice to the chairmen and ranking minority members of the two Intelligence Committees or not give prior notice to anyone, but then inform the Intelligence Committees "in timely fashion."

The bills considered but not passed by the 100th Congress mainly concerned the second of these two exceptions. In the case of the Iran-Contra affair, the President authorized the operation in a finding dated January 1986, but did not notify the Intelligence Committees until November 1986, after an Iranian leak appeared in a Beirut newspaper. Not surprisingly, many Congressmen thought that eleven months stretched the meaning of the words "timely fashion."

Two bills were considered, one requiring prior notification of covert activities in all cases, the other preserving the earlier exception, but limiting the President's freedom not to notify the committees to forty-eight hours. The forty-eight hour bill was the one most extensively considered. It was strongly supported, but died towards the end of the session. The issue will probably be raised again in the 101st Congress.

No comment on this legislation should neglect to note its failure to define intelligence, intelligence gathering, and covert activities, and to distinguish them from the ordinary diplomatic activities of the government. At least for this reader, it is impossible to tell how far the bill could be interpreted to reach the work of the government outside the intelligence community.

In my view, the proposed intelligence oversight legislation is unconstitutional for four reasons:

1. It requires the President to disclose information which Congress can request but not command the President to provide. The historical experience of the United States confirms the wisdom of Marshall's comments on the subject in *Marbury v. Madison*.<sup>34</sup> According to Marshall's opinion in *Marbury*, the President is not accountable to Congress in all cases, or to Congress alone, although he should cooperate with Congress and consult with leading members of Congress and other citizens, as may seem wise to him. But cooperation between President and Congress is not a simple rule of thumb, equally

applicable in every case. And it is not a matter for legislative timetables. The timing and sequence of that cooperation must be flexible and responsive to circumstance. Its success depends ultimately on the political intuition of the chief participants in the process, and, above all, on the political intuition of the President.

When Congress seeks information from the President about his conduct of foreign relations, it should follow nearly invariable precedent by "requesting" the information "only insofar as the transmission of it," in the President's judgment, "is compatible with the public interest," to recall language used by Senator Spooner of Wisconsin in 1906. This is not a matter of courtesy or comity between the two branches of government. Senator Spooner explained his judgment in the following terms:

The State Department stands upon an entirely different basis as to the Congress from other Departments. The conduct of our foreign relations is vested by the constitution in the President. It would not be admissible at all that either House should have the power to force from the Secretary of State information connected with the negotiation of treaties, communications from foreign governments, and a variety of matters which, if made public, would result in very great harm in our foreign relations—matters so far within the control of the President that it has always been the practice, and it always will be the practice, to recognize the fact that there is of necessity information which it may not be compatible with the public interest should be transmitted to Congress—to the Senate or to the House.

There are other cases, not especially confined, Mr. President, to the State Department, or to foreign relations, where the President would be at liberty obviously to decline to transmit information to Congress or to either House of Congress.<sup>35</sup>

Every study of the subject supports Senator Spooner. From the earliest days of the government, the overwhelming majority of attempts by Congress to obtain information from the President or the Secretary of State in the field of foreign affairs were requests, not demands, and were qualified by provisions authorizing the President to withhold information if he thought its disclosure would be inconsistent with

the public interest. Where congressional requests for information did not include the usual qualification, Presidents treated them as if the qualification had been included, and declined to answer nearly as often as they responded. President Washington's refusal to give the House of Representatives information about the negotiation of Jay's Treaty in 1794 is perhaps the most famous of these episodes. Others concerned military, quasi-military and even covert operations during the period of acute controversy with Spain prior to the acquisition of Florida, the Civil War, and later periods of strain.

The reasons for the practice and the rule are rooted in the nature of things. The President is often called upon to prepare or to initiate lines of policy for which public and congressional opinion is not yet ready. In response to those initiatives, circumstances may change, and opinion with it. Could Lincoln have obtained congressional support for many of the steps he took before and immediately after Fort Sumter, while the Civil War was still a threat rather than a consuming reality? Most students of the Civil War agree that Congress would not have approved a proposal to wage war against the Confederacy before the episode at Fort Sumter. In handling those problems, Lincoln kept his own counsel, consulting with very few persons, each carefully chosen by him. Nearly every President has faced problems of the same character, though not of the same magnitude (save in the case of Franklin D. Roosevelt), and they all acted in the same way.

2. Despite its form, however, the intelligence oversight legislation is not a requirement that the President report to Congress certain information Congress regards as important to its legislative duties. It is designed, as its supporters freely concede, to establish a procedure of compulsory consultation between the President and two committees of the Congress. This would put the members of the two committees squarely into the center of the President's decisionmaking process as active and indeed as "equal" participants.

Some defend this extraordinary congressional intrusion into the President's domain as no more than a requirement that under certain circumstances the legislation would "merely" require the President to "consult" Congress, as if

such a requirement were of obvious constitutionality. This is not the case.

Consultation between the President and members of Congress is a political necessity both for members of Congress and for the President. It is an endless process which takes place continuously in a thousand forms—at meetings and poker games, over the telephone, at funerals and weddings, and at solemn meetings in the White House. The President can never consult “Congress”; he can only consult members of Congress. The word “consultation” is not a term of constitutional import. And Congress is a collective body which can act authoritatively only by passing a bill or joint resolution which is then presented to the President for signature. When, how, and whom to consult is a political art, often one of supreme importance to Presidents and members of Congress alike. But it cannot be structured and regulated. In a recent article I said, “Congress cannot command the President to consult with a particular Member of Congress any more than it can tell him who his Secretary of State or his most trusted advisers should be. Any such attempt would interfere with the President’s most sensitive executive discretion, that of political leadership.”<sup>36</sup> That comment was addressed to the War Powers Resolution of 1973. It applies equally to the intelligence oversight legislation.

3. In fact, the intelligence legislation goes far beyond reporting and consultation. It would give the two intelligence committees of Congress, or one acting alone, an unconstitutional legislative veto over a wide and undefined class of Presidential decisions in the field of foreign policy. The testimony on H.R. 3822 before the Second Session of the 100th Congress makes it perfectly clear that its draftsmen designed the bill as a device which would allow the two congressional committees to prevent Presidents from acting as President Reagan did in seeking to improve our relations with Iran by methods which included secret arms sales. As Senator Cohen said in his speech on the floor of the Senate on March 3, 1988, the object of the bill is to allow small groups of Congressmen to keep the President from making what they regard as

mistakes—that is, to substitute their judgment for that of the President on how to conduct our foreign affairs.

Senator Cohen insists that Congress is looking for a “voice” in the decisionmaking process, not a “veto.” The Senator’s contention is without constitutional substance. Neither the Constitution nor the pattern of constitutional practice before 1980 gives the slightest support to the claim that the law-making authority has the right to offer the President advice in advance of his decision about how to carry out his constitutional duty faithfully to execute the laws. The Senator’s claim of such a right crosses the boundary line between the legislative and the executive power. There is no such right, even with respect to treaties. In many, perhaps most, cases, a wise and prudent President will consult members of Congress or citizens he regards as specially qualified to advise him on a given subject before he decides on his course of action. But the choice has always been his. Indeed, the cases where a President chooses not to consult in advance have been among the most important in our history.

In any event, under the highly charged circumstances of the cases covered by H.R. 3822, the 1988 proposal to amend the Intelligence Oversight Act, a congressional voice cannot be distinguished from a congressional veto. It requires a robust imagination to suppose that a President would continue a covert operation if an influential group of important Congressmen advised him vehemently that the proposed action would be a political disaster—another Watergate or Irangate. Senator Cohen concedes that in consultations under the 1980 statute, congressional advice has invariably been followed. The conclusion is hardly surprising.

Thus, the constitutional problem presented by the proposed legislation is similar to that presented by the War Powers Resolution. To be sure, there is no formal provision in H.R. 3822 for a legislative veto which would override a President’s decision to undertake the intelligence activity he has reported to the intelligence committees of Congress. It does not provide for veto by Concurrent Resolution or one-House Resolution or even a veto by silence, through failure to pass a resolution within a sixty-day period. The veto H.R. 3822

establishes is far more drastic: veto by the secret advice of one or both of the Intelligence Committees, or of a smaller group.

4. The focus of public controversy over H.R. 3822 in 1988 was section 503(c), which provides that no special intelligence activities may be initiated before the Intelligence Committees are formally notified, except where the President determines in special circumstances that time is of the essence. Even where delay in notification is justified, the committees will be notified within forty-eight hours after the special activity has been authorized by the President.

These provisions raise the same constitutional problems with respect to the compulsory provision of information, consultation, and the legislative veto which were discussed in the preceding sections of this paper. They have still another constitutional dimension, however.

In section 502, the bill seeks to impose separate and comprehensive reporting requirements on the Director of Central Intelligence and the heads of all other departments, agencies, and other entities involved in intelligence activities. Such a requirement would be constitutionally appropriate for ministerial functions of the branches of the government involved in intelligence, but not for their policy programs. As written, the bill can only have the effect of weakening the ties between the President and the intelligence community and bringing it more and more under the control of the two congressional intelligence committees. A Deputy Director of Central Intelligence has remarked that the CIA is already "equidistant" between the President and the two Intelligence Committees of the Congress. Manifestly, this is an unconstitutional development, which all concerned with the integrity of the Constitution should oppose.

#### C. AMENDING THE WAR POWERS RESOLUTION OF 1973

Except for Carter, all the Presidents since 1973 have asserted that the War Powers Resolution is unconstitutional. Many, perhaps most, commentators have agreed, if only on the narrow ground that the principal operative feature of the act is a legislative veto condemned by the *Chadha* case.

The War Powers Resolution presents many of the constitutional issues canvassed in preceding sections of this paper. It purports to give Congress the power, through both active and passive legislative vetoes, to overrule Presidential decisions about the threat and use of force in times of peace, and it imposes reporting requirements and requirements of "consultation" comparable to those developed in the intelligence oversight legislation. Thus, like those statutes, it rests on the proposition that Congress is the fount of sovereignty in the American government, as the House of Commons is in Great Britain; that the President is accountable to Congress in all aspects of his duty; and that Congress can if it wishes participate "as an equal"—or, more accurately, as the senior partner—in the making of executive decisions.

It is hard to imagine a more direct repudiation of American political theory. In our jurisprudence, sovereignty is deemed to be vested in the people, not the Congress. The people have delegated some of their powers to the government of the United States through a Constitution which establishes three interdependent branches, each of which, however, has the authority to make some final decisions in its own realm.

Because of the importance of its subject matter, the War Powers Resolution is by far the most significant and revolutionary of all the recent attempts to transform the tripartite Constitution we have inherited into a parliamentary system governed by a series of baronial congressional committees operating in different fields. It does not require much acuity to foresee that such a system would quickly be dominated by a single congressional committee, a true Parliamentary Cabinet for all purposes.

Since I have attempted to analyze and evaluate the War Powers Resolution elsewhere,<sup>37</sup> I shall concentrate here on the amendments to the act proposed by Senators Byrd, Nunn, Warner, and Mitchell in 1988, and revived in 1989 by the original sponsors plus Senators Boren, Cohen, and Danforth. The significance of S. 2 is emphasized by the outstanding quality of its sponsors, who by any standard rank among the most distinguished members of the Senate.

While some of the amendments suggested by the sponsors of S. 2 are meritorious, the net effect of their bill would be far worse than that of the War Powers Resolution itself. The War Powers Resolution calls for "consultation" between the President and Congress but does not purport to specify the modalities of that consultation. S. 2 would establish a "permanent consultative group" of members of Congress and endow it with the power to compel the President to report, to propose, to listen, and in fact to obey. To call things by their simple names, it would abolish the Presidency created by the Constitution of 1787.

Section 2 of S. 2 is an interesting concession to reality. It would repeal section 2(c) of the War Powers Resolution, which declares that under the Constitution the President can use the armed forces only pursuant to a declaration of war, "specific" statutory authorization, or a national emergency caused by an attack on the United States, its territories or possessions, or its armed forces. Thus, the bill would acknowledge that section 2(c) of the 1973 text is hopelessly inadequate as a restatement of constitutional doctrine; that under the Constitution the President does indeed have a wide range of discretion in using the armed forces without advance congressional "authorization," "specific" or otherwise; and that the course of wisdom is to drop the subject altogether. Statutes are not useful publications in which to attempt the codification of constitutional doctrine.

The sponsors of S. 2 are clearly right in recommending the repeal of section 2(c) of the 1973 act. Repealing section 2(c), however, would destroy the major premise on which the 1973 act was enacted, namely, that except in repelling sudden attacks, the President can employ the armed forces only when directed to do so by Congress. Senator Javits had bravely said that the purpose of the War Powers Resolution was to reduce the President to the status of George Washington as Commander-in-Chief under the Continental Congress. S. 2 would acknowledge that one of the main purposes of the Constitution of 1787 was to create an altogether different President and Commander-in-Chief, an official vested with prerogative authority as well as the duty faithfully to execute the

treaties of the United States and the statutes passed by Congress. In short, it accepts the sensible view that when Madison mentioned "sudden attacks" in the course of the debates at the Convention, he was giving his colleagues an example of the kind of thing Presidents sometimes have to do, not creating a rigidly fixed category of grudging exceptions to a general rule.

Section 3 of S. 2 attempts to put procedural flesh on the concept of consultation called for by section 3 of the 1973 Statute. It would create a "permanent consultative group" of the Congress, consisting of the Speaker of the House and the President pro tempore of the Senate, the Majority and Minority Leaders of the House and Senate, and the Chairmen and ranking minority members of the House and Senate Committees on Foreign Affairs (and Foreign Relations), the Armed Services, and Intelligence. The President and the members of Congress who constitute the Permanent Consultative Group are directed by the bill "to establish a schedule of regular meetings of those members with the President." In addition, the President is required by the bill to consult with the group whenever a majority of its members so request, unless the President determines that "extraordinary circumstances affecting the most vital security interests of the United States" make it "essential" to limit consultation to the Speaker of the House, the President pro tempore of the Senate and the Majority and Minority Leaders of the House and Senate. During odd-numbered Congresses, the Speaker of the House would serve as Chairman of the permanent consultative group and the President pro tempore of the Senate as Vice-Chairman. During even-numbered Congresses, their roles would be reversed. Additional meetings of the group could be called by the Chairman or, in his absence, by the Vice-Chairman, or by a majority of the membership. While the bill does not quite make the point clear, it seems apparent that the draftsmen intend the consultative meetings to take place in the Capitol, not in the White House, giving a congressional committee for the first time in history the power to summon the President to appear before it.

Section 4 of S. 2 would repeal sections 5(b) and (c) of the 1973 act, its passive and active legislative veto provisions,

and substitute a new section which would authorize the consultative group to introduce joint resolutions of approval or disapproval whenever the President reports, pursuant to the reporting requirements of the 1973 act, that the armed forces are engaged abroad in hostilities or in situations where imminent involvement in hostilities is clearly indicated by the circumstances, and war has not been declared.

While section 4 of S. 2 would repeal the most blatantly unconstitutional feature of the 1973 act, its legislative veto provision, it introduces a new one, equally unconstitutional. Section 4 of the 1973 act requires the President to report to Congress within forty-eight hours (and not less often than every six months thereafter) whenever hostilities are taking place or the imminent risk of hostilities is manifest within the definitional framework of the 1973 act. There have been disagreements between Presidents and members of Congress as to whether the President was required to report under section 4 every time the armed forces have been sent abroad since the act was passed—in the Persian Gulf, Lebanon, and Grenada, to mention a few conspicuous cases, and in the *Mayaguez* incident as well. S. 2 attempts to settle the controversy by giving a majority of the permanent consultative group the power to decide whether circumstances require the President to file a report under section 4(a)(1) of the 1973 act, as it would be amended by S. 2.

Unless there is guidance from the courts, the President or his agents must interpret a statute (or treaty) every time it is applied to a new situation. Such interpretation is the essence of the executive function. Thus it is necessarily for the President, not the Congress, to decide whether a given set of circumstances involves the risk of imminent involvement in hostilities within the meaning of the War Powers Resolution. If Congress does not agree with the Executive's construction of a law or treaty, it has only one constitutional remedy: to pass a new law, over the President's veto if necessary. By attempting to give the permanent consultative group the power to trigger the application of the reporting requirement of the 1973 act, section 4(6) of S. 2 would take over an executive function and is therefore unconstitutional. S. 2 would permit

Congress to control the development and execution of the law free not only from the President's veto but even from the necessity of obtaining a majority vote from Congress itself. A congressional committee is not Congress and the legislative powers of Congress cannot be delegated to it.

Section 5 of S. 2 would repeal section 6 of the 1973 act, which established an elaborate priority procedure for Congress, assuring its prompt action on resolutions to authorize the President to continue hostilities after the sixty- or ninety-day periods of the act had expired. Under the 1973 act, the President's authority expired after sixty or ninety days if Congress did nothing. Section 6 of the 1973 act was never tested, but it was generally thought to be unworkable. The draftsmen of S. 2 have devised a substitute enforcement device, based in part on Congress' power of the purse. It provides that no funds appropriated or otherwise made available under law may be obligated or spent for any activity which would violate any provision of law enacted according to section 5, whether enacted under the sponsorship of the permanent consultative committee or of Members of Congress who do not belong to it. Would this strange proposal mean that the entire Department of Defense would grind to a halt (under the threat of criminal sanctions) if the President carried on a Grenada-type operation in the face of a congressional command believed to be unconstitutional?

Section 6 of S. 2 would replace section 7 of the 1973 act by mandating a priority procedure for enacting the joint resolutions contemplated by section 5(6) (2), that is, the resolutions introduced by the permanent consultative group or by other Members of the Congress.

This and like provisions both of the 1973 act and of S. 2 raise a curious constitutional question. They purport to enact binding rules of procedure for both Houses of Congress. Article I, section 5 of the Constitution specifies that "each house may determine the rule of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member." This provision preserves an important weapon in Parliament's long struggle for independence of the Crown in England. What business has the

Senate in ordaining a procedural rule for the House, or the House in ordaining such a rule for the Senate? And what business has the President in approving or disapproving the procedural rules of either House?

The Rules of Procedure for each House, starting with Jefferson's Rules, have been adopted over the years first as a matter of practice and finally (often with reservations) by its own Resolutions. True, the constitutional sentence is permissive rather than obligatory in form and there have been a few modern instances of rule changes accomplished by statute, especially where expedited procedures were deemed desirable. Their constitutionality has never been adjudicated. But is it any more conceivable that the President or the Senate have a voice in a House rule of procedure than in a vote punishing or expelling a member? Clearly, what the sponsors of S. 2 have in mind in proposing to fix procedural rules for each House by statute is to commit the President to a procedure of consultation with Congress which would transform the flexible interchange of political partners into a formal relationship of seigneur and vassal.

The draftsmen of S. 2 recognized the problem they faced under article I, section 5, of the Constitution and attempted to evade it in section 6, where subsection (h) provides

(h) This section is enacted by the Congress.....

(1) as an exercise of the rulemaking power of the Senate and House of Representatives, respectively, and as such it is deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of a joint resolution, and it supersedes other rules only to the extent that it is inconsistent with such rules; and

(2) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner, and to the same extent as in the case of any other rule of that House.

One obvious difficulty with subsection (h) is that it might explain or justify proceeding by Concurrent Resolution, but not by Joint Resolution. A Concurrent Resolution could establish identical rules for each House through their cooperative action. But neither a Concurrent nor a Joint Resolution could

have bootstraps long enough to bind a President to abandon the constitutional duties of his office.

All in all, then, I conclude that the War Powers Resolution would be far more objectionable were S. 2 to be enacted than it is in its present form.

**D. THE CONTROVERSY ABOUT THE "REINTERPRETATION" OF THE ABM TREATY** In 1983, President Reagan announced his SDI program to accelerate research and development about devices and systems for defense against ballistic missiles. A violent controversy immediately exploded about whether the SDI program was compatible with the ABM Treaty.

This section of the paper will focus on an article on the subject by Professor David Koplow of the Georgetown University Law School.<sup>38</sup> Professor Koplow was Reporter for the Special Working Committee on the Legal Aspects of Arms Control and Disarmament Policy of the American Society of International Law. In 1988, the Committee produced an Interim Report on the controversy about the interpretation of the ABM Treaty. Professor Koplow has written an article based on the Working Committee's Interim Report. The comments which follow are drawn from my Dissent from the Committee's Report.

Koplow asserts that "(a) new constitutional crisis has been thrust upon the American body politic." He defines that crisis in the following terms:

In particular, the 1972 Treaty on Anti-Ballistic Missile Systems (ABM) and the Intermediate-range Nuclear Forces (INF) Treaty have been embroiled in an attempt by the Executive to reserve the right unilaterally to reinterpret treaties.

What is immediately at stake in executive re-interpretation has been a threat to gut the central purposes of the ABM Treaty and to abort the nascent INF Treaty. Unless corrected, attempts by the Executive to usurp treaty re-interpretation power will, in the longer term, undermine United States arms control policies, jeopardize future Strategic Arms Reduction Talks ("START") agreements, and weaken the security of the international community.<sup>39</sup>

This statement by Koplow supports and echoes the following two paragraphs of the Draft Interim Report:

The Reagan Administration has recently asserted that the executive branch possesses a previously-unknown constitutional authority to reinterpret unilaterally the United States' international treaty obligations, departing from authoritative prior representations provided to the Senate at the time of advice and consent to ratification. This proposition—initiated, but not implemented, in the case of the 1972 US-USSR treaty on Anti-Ballistic Missile Systems—would jeopardize virtually all US treaty obligations, and it carries profound implications both for the orderly evolution of the system of international law and adherence to the constitutional scheme of separation of powers.

The Special Working Committee on Legal Aspects of Current Issues of Arms Control and Disarmament Policy of the American Society of International Law, having studied the historical precedents of arms control treaties, and having surveyed the applicable principles of international and domestic U.S. law, finds that this novel assertion of a reinterpretation power is unsubstantiated and improper. The executive branch cannot disregard the Senate's constitutional role in the treaty process, and must recognize and give domestic effect to the treaty as it was approved by the Senate—including the Senate's implicit understandings that may have been based upon executive branch testimony and representations.<sup>40</sup>

Since the President necessarily interprets and reinterprets every statute and treaty each time he applies them to a new fact situation, the constitutional authority about which Koplow and the Report wax so indignant is an essential part of the executive power entrusted to the President under article II of the Constitution. Section 326(1) of the Restatement (3d) of the Foreign Relations Law of the United States fully recognizes that the authority to determine the interpretation of an international agreement is an executive function reserved to the President; Comment (a) of that section of the Restatement ventures the observation that if there are, in fact, "understandings expressed by the Senate in giving its advice and consent," they must be respected by the President.<sup>41</sup> The Senate expressed no such "understandings" in its Resolution of Consent to the Ratification of the 1972 ABM Treaty.

It is, therefore, difficult to define the grave threat that Koplow perceives to the orderly evolution of international and constitutional law. If Congress disagrees with the President's interpretation of a treaty (or a statute), its constitutional remedy is to pass a statute subject to the President's veto. This was done, for example, during the dispute over economic sanctions against the then government of Rhodesia some fifteen years ago.<sup>42</sup> Subsequent statutes inconsistent with a President's interpretation of a treaty or statute are commonplace in our legal history. And, of course, they prevail as law, as they do when Congress disagrees with the judicial interpretation of a statute and passes a new law to change it.

This is the real point at issue in the controversy over the alleged "reinterpretation" of the ABM Treaty. What the Senate has been seeking is not to reaffirm the power of Congress to overrule a President's construction of a treaty, which needs no reaffirmation, but to acquire an entirely new and clearly unconstitutional Senatorial veto over the exercise of an important aspect of the President's executive powers.

There is another element in the controversy: the claim that the Reagan administration's construction of the ABM Treaty with regard to "novel" anti-missile technologies differs from views expressed in 1972 by officials of the Nixon administration during the Senate committee hearings on ratification. Koplow strongly implies that such a change of position, if shown, would somehow be improper. The facts do not support Koplow. Neither does the law.

The brief colloquy before the Senate Armed Services Committee on which the Koplow article relies raises more questions than it settles. As a matter of legal craftsmanship, it is perfectly reasonable to argue, as Koplow and others do, that article 5 of the ABM Treaty, confining ABM systems to fixed ground-based devices, applies also to systems based on new and unknown technologies. The difficulty with the argument, however, is that it is inconsistent with the facts, and does not do justice to the position the Soviet representatives took at the time, embodied ultimately as Agreed Statement D. Agreed Statement D is a joint Soviet-American interpretation of the treaty, formally annexed to it. It provides that the parties will

reach agreement under article XIV of the treaty, dealing with amendments, before deploying ABM systems or components of existing ABM systems "based on other physical principles." That phrase is generally taken to mean physical principles other than those then in use for ABM purposes at the time the treaty was signed.

According to senior participants in the negotiations—Kissinger, Haig, and Nitze, among others—the Soviets said, in effect, "we do not know what future technologies will make possible and neither do you. Therefore we should not attempt to legislate on the subject, but leave it open." Nearly all who have seriously reviewed the negotiating record confirm this view. By prohibiting deployment without prior discussion and agreement, does Agreed Statement D necessarily imply that the treaty permits research, development, and testing of "other" technologies? That would be the normal legal reading of the document, and the normal common-sense reading as well, since the deployment of an ABM system could hardly be undertaken before it had been developed and tested.

Some experts in the field have recently claimed, however, that despite Agreed Statment D and its negotiating history, the treaty allows the development and testing of ABM systems based on novel technologies only if it is known in advance that they would be ground-based.

In the nature of science, it is impossible to know in advance what a new line of research is going to produce. And in the nature of arms control agreements, it is impossible to verify compliance with prohibitions on lines of research and development. For that reason, among others, no one has claimed that any other arms control agreement prohibits research and development. The ABM Treaty was submitted to the Senate by the President on the basis of a statement by the Secretary of State assuring the President and the Senate that the treaty was verifiable by national technical means. Executive branch colloquies with Senators in the course of the treaty ratification process should be construed so far as possible in a manner consistent with that formal and authoritative assurance.

A single important case, that of the laser, demonstrates the weakness of the argument that the ABM Treaty should

be construed to prohibit the development and testing of some ABM systems based on novel technologies. The use of the laser as a possible future technology for ABM purposes was much discussed in 1972, when the ABM Treaty was ratified.

Many thought there was great promise in using lasers to attack ballistic missiles in their boost phase. An anti-ballistic laser could not ordinarily reach beyond the horizon if it were ground-based. And if it were placed on a long-range missile it would have to go through outer space twice, thus risking extensive diffusion of its beam. Therefore there was extensive interest in the possibility of a space-based laser, which could directly attack missiles as they were launched.

During the hearings on the ratification of the SALT agreements before the Senate Armed Services Committee, several Senators asked a number of witnesses whether the treaty would prevent the United States from developing and testing ABM systems utilizing lasers and other new technologies. They were uniformly assured that while the treaty prohibited deployment without agreement with the Soviets, nothing in the treaty would "slow us up or slow us down on continued research and development of the laser."<sup>43</sup> As General Palmer said at another point in the hearing, "There is no limit or understanding of a limit on R&D in the futuristic systems, but it would require an amendment to the treaty or further agreement to deploy such a system."<sup>44</sup> Senator Goldwater asked Gerard Smith, then Director of ACDA, "Under this agreement, are we and the Soviets precluded from the development of the laser as an ABM?" Mr. Smith's answer was a categorical, "No, Sir."<sup>45</sup>

In a prepared answer to a question from Senator Goldwater, submitted for the record of the hearings, Secretary of Defense Laird answered at greater length, but to the same effect.

Question. The ABM bit does not bother me too much, although I have not seen the fine print. For my money, we should have long since moved on the space based systems with boosting phase destruction with shot, nuc's, or laser. I have seen nothing in SALT that prevents development to proceed in that direction. Am I correct?

**Answer.** With reference to development of a boost-phase intercept capability or lasers, there is no specific provision in the ABM Treaty which prohibits development of such systems.

There is, however, a prohibition on the development, testing, or deployment of ABM systems which are space-based, as well as sea-based, air-based, or mobile land-based. The U.S. side understands this prohibition not to apply to basic and advanced research and exploratory development of technology which could be associated with such systems, or their components.

There are no restrictions on the development of lasers for fixed, land-based ABM systems. The sides have agreed, however, that deployment of such systems which would be capable of substituting for current ABM components, that is ABM launchers, ABM interceptor missiles, and ABM radars, shall be subject to discussion in accordance with article XIII (Standing Consultative Commission) and agreement in accordance with article XIV (amendments to the treaty).<sup>46</sup>

It is thus a myth to claim that there was a "traditional, restrictive" interpretation of the application of the ABM Treaty to novel technologies between 1972 and the Reagan administration, and a departure from the true faith thereafter. The State Department Legal Adviser, Judge Sofaer, has fully demonstrated how hollow that claim is. The so-called "restrictive" or "traditional" interpretation made its first official appearance in 1979. John Rhinelander dealt with the problem at an A.S.I.L. meeting in 1973 in the following terms, which are almost exactly the conclusions subsequently reached by Judge Sofaer: "[T]he treaty prohibits the deployment (but not the development and testing) of 'future' ABM missiles, launchers, and radars."<sup>47</sup> The General Counsel of ACDA during most of my term as Director, Col. A. Richard Richstein, has recalled that during the period 1981-1983, no research and development program involving novel physical principles was scrutinized, curtailed, modified, or cancelled on the ground that the ABM Treaty required such action. Furthermore, the ACDA publication, "Arms Control and Disarmament Agreements," published between 1972 and 1982, does not reflect or support the view that there was a traditional "narrow" interpretation of the application of the ABM Treaty to novel technologies, although it included a number of

statements touching on the issue. And the law remains clear in any event, as Koplow agrees, that a treaty is a contract between states and must be construed as such. Learned quarrels among American experts do not bind the Soviet Union.

The phenomenon of Presidential interpretation and reinterpretation of treaties is not "previously unknown," as Koplow states. It occurs daily in every nook and cranny of the law. When the President sends instructions to representatives of the United States at the United Nations Security Council and at international conferences on dozens if not hundreds of subjects ranging from telecommunication and aviation to fisheries and the law of war, he is interpreting and reinterpreting treaties as he "faithfully executes" the law. So was President Carter when he decided he could abrogate the Security Treaty between the Republic of China on Taiwan and the United States. Similar interpretations and reinterpretations are made by the executive branch in carrying out domestic statutes of all kinds: the Internal Revenue Code, for example.

This process of change and development is inherent in the growth of law. Sometimes the changes are incremental, sometimes considerable. They are, in fact, inevitable as law confronts life every day of the week. Laws evolve around the broad policy purposes sought by their progenitors. But the progenitors can never freeze the law into a static pattern, nor anticipate exactly how it should be applied in all future circumstances. Nor can it be assumed that every lawmaker voted for the reasons advanced by one or a number of his or her colleagues in debate, or by representatives of the executive branch in testimony before committees.

The assertion in the Draft Interim Report, supported by Koplow's article, that a President is bound to give "domestic" effect to a treaty as it was approved by the Senate—"including the Senate's *implicit understandings* that *may* have been based upon executive branch testimony and representations"—is worthy of a jurisprudential King Canute. It demands an outcome that can never be delivered, as the history of law attests. The growth of law cannot be confined by so simple a rule. Of course, witnesses for the executive branch should tell the truth to congressional committees, and they normally do,

insofar as they can perceive it. And, of course, Congress is entitled to rely on their testimony. But even if Senators are misled or do not understand what they have heard or read, the Senate's Resolution of advice and consent is nonetheless an official act, and cannot be collaterally impeached. In some state legislatures, the Fourteenth Amendment may well have been approved by dubious procedures, especially because the South was still occupied when ratification occurred. When Congress certified that it had been adopted, however, it became and remains the law. Those who sought to have the amendment annulled because some state legislatures were, they said, "coerced" into ratification were given short shrift by the courts.

In any case, "the truth" is not always easy to know, as Koplow's analysis convincingly demonstrates. The application of the ABM Treaty to novel technologies was not a major issue in the ratification process in 1972. A few exchanges before a committee, a few sentences in prepared statements or speeches on the floor may, of course, have been among the factors persuading a Senator to vote "yea" or "nay" on the Resolution giving the Senate's advice and consent to ratification. For example, Senator Goldwater said he would vote against ratification unless he were convinced that the treaty would permit the development of space-based laser ABMs. But the larger meaning of ABM and the Interim SALT agreement together was quite different. Those agreements were considered to have been a matter of great importance to the future of Soviet-American relations and to the Republican Party in the 1972 elections. As many judges have said, however, neither the courts nor the executive branch can or should assume that the legislature as a whole voted in reliance on any particular statement made in the course of debate. After all, many remain silent. Justice Jackson once acidly remarked that it is not yet the rule that a judge can examine the text of a statute or a treaty only if the legislative history is ambiguous.

In this instance, the text of the ABM Treaty, read in the perspective of its policy goals and the setting of its negotiation and presentation, is hardly a mystery. The American negotiators tried to persuade their Soviet opposite numbers

that the treaty should apply to all anti-missile defenses, whether based on current or on future technologies. The Soviet negotiators refused, saying over and over again that it was impossible to legislate about weapons whose potentialities were unknown to both sides. Ambassador U. Alexis Johnson, an experienced and responsible witness, carefully informed the Senate that Soviet views on these subjects did not necessarily agree with our own. Agreed Statement D was the consequence.

Later, some American officials persuaded themselves that the Soviet Union had really agreed with our position in 1972. Now, of course, the Soviet government has obligingly cooperated. Confronting these facts, on which all sides were once agreed, the Senate and the A.S.I.L. Working Committee Report cannot credibly claim that the few comments seeming to lend wavering support to the so-called "restrictive interpretation" were *the* "basis" for the Senate's consent to the treaty's ratification. The Senate made no reservation or statement of understanding on the subject. Under such circumstances, according to Comment (d) of section 314 of the Restatement, at least, the matter could become, at best, material for debate about "legislative history."

I do not agree with the language on this subject put forward in the American Law Institute's new Restatement of Foreign Relations Law. But the formulation in the Koplow article goes far beyond the Restatement. Section 314(2) of the Restatement says that "[w]hen the Senate gives its advice and consent to a treaty on the basis of a particular understanding of its meaning, the President, if he makes the treaty, must do so on the basis of the Senate's understanding."<sup>48</sup> Both Comment (b) on this section and Comment (a) on section 326 refer to written statements of understanding by the Senate, transmitted verbatim to the other party or parties, and included in the President's proclamation of ratification. These are not empty formalities, but essential procedural steps in treating the agreement at all times as a contract between states.

No citations of authority are offered in support of the A.L.I. Reporter's Comments. But whatever the status of these sections of the Restatement may turn out to be as predictions of the law, they do not approach the extreme statements in

Koplow's article or the Draft Report of the A.S.I.L. Working Group. Either formula would severely constrain the dialogue between the executive branch and the Senate and multiply suspicions within a relationship which should be one of confidence, cooperation, and candor.

#### IV

#### *Conclusion*

These four recent episodes are simply conspicuous and dramatic examples of a large class of statutes and practices no one has yet mapped systematically. Comparable constitutional questions arise throughout the realm of governmental activity. Some are trivial, others merely annoying, others still are intrinsically important. What is certain, however, is that the power of Congress is growing, and that of the President is being leached away.

A few students think the war has been irrevocably lost. They advise that we give up the idea of the Presidency altogether, and adopt a constitutional amendment establishing a Parliamentary system. There is irony in their proposal, because most Parliamentary systems are seeking to make their Prime Ministers more like the American President. The demands on the governments of modern welfare-state capitalist democracies and the nature of modern mass politics both require the energy and leadership of a strong executive.

I do not agree with those who would jettison our Hamiltonian Presidency. The constitutional moral of American history is that the Constitution of 1787, as it has evolved, is the most appropriate possible guide for the organization of the American government—appropriate in providing a workable structure for managing a huge, sprawling continental democracy, appropriate also in encouraging the fulfillment of the accepted moral goals of the American polity.

There is another moral, too. There is no reason in experience to doubt the capacity of this staunch tradition to surmount the challenge of the present crisis as it has prevailed over much worse crises so many times before. The political

system that triumphed during and after the Civil War will not dissolve in the rain.

### Notes

1. Alsop and Catledge, *The 168 Days* (1938); Jackson, *The Struggle for Judicial Supremacy* (1941); Burns, *Roosevelt, The Lion and the Fox* (1956).
2. *The Works of Alexander Hamilton* (H.C. Lodge, ed.), 432, 437.
3. Save where justice to the accused in a criminal case requires otherwise. *Nixon v. United States*, 437 U.S. 683 (1974).
4. *Marbury v. Madison*, 1 Cranch 137, 165-66 (1803).
5. *Myers v. United States*, 272 U.S. 52, 293 (1926).
6. *INS v. Chadha*, 462 U.S. 919 (1983). In this case the Court held unconstitutional the provision of a statute authorizing one House of Congress to override an order of the Immigration and Naturalization Service of the Department of Justice denying deportation. The alien was not deported.
7. *The Federalist* (Modern Library ed., 1937), No. 47, pp. 312, 313.
8. *Id.*, No. 48, p. 321.
9. *Ibid.*
10. *Id.*, No. 48, pp. 321, 323.
11. *Ibid.*
12. *Ibid.*
13. *Id.* at p. 322.
14. A. D. Sofaer, *War, Foreign Affairs and Constitutional Power*, Vol. 1, *The Origins* (1976) and H. B. Cox, *War, Foreign Affairs and Constitutional Power*, Vol. 2, *1829-1901* (1984).
15. "The Legislative-Executive Balance in International Affairs: The Intent of the Framers," 12 *Washington Quarterly* No. 1, 99, 104 (1989).
16. *Id.* at pp. 100-3.
17. E. V. Rostow, "'Once More Unto the Breach': The War Powers Resolution Revisited," 21 *Valparaiso Law Review* 1, 5-18 (1986).
18. *The Works of Alexander Hamilton* (H. C. Lodge, ed.), 432, 437.
19. John Locke, *Two Treatises of Government* (P. Laslett, rev. ed., 1960) Book II, Ch. 14, pp. 159-66. See also *Federalist*, No. 41 (Madison), Modern Library Edition (1937), pp. 259, 262.
20. F. M. Kaiser, "Congress and National Security Policy." Paper prepared for discussion at National Defense University Symposium, Dec. 1, 1988, pp. 6-7.
21. *Id.* at p. 7. See also Louis Fisher, "Why Congress Passed the War Powers Resolution," Paper presented at a conference entitled, "The War Powers Resolution at Fifteen: Where To From Here?," School of Law, University of Virginia, Sept. 23, 1988. Mr. Fisher's views are presented more

fully in his thoughtful and important books, *Constitutional Conflicts Between Congress and the President* (1985) and *Constitutional Dialogues* (1988). See also Edward Keynes, *Undeclared War: Twilight Zone of Constitutional Power* (1982), reviewed by W. Taylor Revely III, 83 *Columbia Law Review* 2117 (1983).

22. Louis Henkin, "Foreign Affairs and the Constitution," 66 *Foreign Affairs* (Winter, 1987-88) 284, 292-95, 307.

23. *Id.* at 307.

24. E. V. Rostow, "The Democratic Character of Judicial Review," 66 *Harvard Law Review* 193 (1952).

25. *Myers v. United States*, 272 U.S. 52, 276 (1926).

26. *U.S. v. Lovett*, 328 U.S. 303 (1946).

27. Henkin, *op. cit.* note 22, *supra*, at p. 296.

28. See Hamilton, *op. cit.* note 2, *supra*. As Secretary of State, Jefferson had expressed the same view in an opinion on the Powers of the Senate Respecting Diplomatic Appointments, April 24, 1790, in 16 *The Papers of Thomas Jefferson* 378-79 (J. Boyd, ed., 1961).

29. 4 Wheat. 316 (1819).

30. *Id.* at p. 421.

31. *The Tower Commission Report (Report of the President's Special Review Board)* (1987); *Report of the Congressional Committee Investigating the Iran-Contra Affair, House of Representatives, Select Committee to Investigate Covert Arms Transactions with Iran*, House Report 100-433; *Senate Select Committee on Secret Military Assistance to Iran and the Nicaragua Opposition*, Senate Report No. 100-216, 100th Cong., 1st sess. (1987).

32. J. B. Moore, *The Digest of International Law* (1906), 409-14; Helen Whiteman, *Digest of International Law* (1969) 211-36; R. Y. Jennings, *The Caroline and McLeod Cases*, 32 *American Journal of International Law* 82 (1938).

33. *Bas v. Tigny*, 4 Dall. 37 (U.S. 1800) and *Little v. Barreme*, 2 Cranch 170 (U.S. 1804).

34. See notes 3 and 4 and accompanying text.

35. Quoted in Edward S. Corwin, *The President: Office and Powers* (1940), at p. 404.

36. E. V. Rostow, *op. cit. supra* note 17, at p. 41.

37. Most of what I have published on the subject is listed in the opening note to the article referred to in note 17.

38. David Koplow, "Constitutional Bait and Switch: Executive Reinterpretation of Arms Control Agreements," 137 *University of Pennsylvania Law Review* 1353-1435 (1989). The literature on the subject is voluminous but repetitive. See, e.g., Association of the Bar of the City of New York, *The Anti-Ballistic Missile Treaty Interpretation Dispute* (1988); A. D. Sofaer, "The ABM Treaty Studies," Office of the Legal Adviser (1987); Chayes and Chayes, "Testing and Development of 'Exotic' Systems Under the ABM Treaty: The Great Reinterpretation Caper," 99 *Harvard Law Review* 1956 (1986).

- 39. Koplow, *op. cit. supra*, note 38, at p. 1353.
- 40. *Special Working Committee on Legal Aspects of Arms Control and Disarmament Policy of the American Society of International Law, Interim Report*, pp. 4-5 (1988).
- 41. *Restatement (Third) of the Foreign Relations Law of the United States*, Sec. 326, Comment A (1987) (hereinafter *Restatement*).
- 42. *Diggs v. Shultz*, 470 F. 2nd 461 (D.C. Cir. 1972).
- 43. United States Senate, *Military Implications of the Treaty on the Limitations of Anti-Ballistic Missile Systems and the Interim Agreement on Limitation of Strategic Offensive Arms*, Hearings Before the Committee on Armed Services, 92nd Cong., 2nd sess. (1972), p. 222.
- 44. *Id.* at p. 438.
- 45. *Id.* at p. 306.
- 46. *Id.* at pp. 40-41.
- 47. "An Overview of SALT I," 69 *American Journal of International Law Proceedings* 29, 32 (1973).
- 48. *Restatement (Third) of the Foreign Relations Law of the United States*, at Section 314 (2).

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